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No.

In the Supreme Court of the United States

OCTOBER TERM, 1982

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ALFONZO L. DOWELL AND VIVIAN T. DOWELL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Section 6501(a) of the Internal Revenue Code of 1954 (26 U.S.C.) provides that "the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed * * *." Section 6501(c)(1) sets forth an exception for false or fraudulent returns, providing that in such cases, "the tax may be assessed * * * at any time."

The question presented is whether the statutory exception prescribing that no period of limitations is applicable to fraudulent returns requires that where a fraudulent return is filed in the first instance, the subsequent filing of an amended nonfraudulent return does not commence the running of the three-year statute of limitations.

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Statute:

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The first opinion of the Tax Court (App. A, *infra*, 1a-5a) is reported at 68 T.C. 646. The first opinion of the court of appeals (App. B, *infra*, 6a-11a) is reported at 614 F.2d 1263. The Tax Court's opinion on remand (App. C, *infra*, 12a-20a) is not officially reported. The opinion of the court of appeals on the second appeal (App. D, *infra*, 21a-32a) is not reported.

JURISDICTION

The judgments of the court of appeals (App. E, *infra*, 33a-34a) were entered February 11, 1980, and January 19, 1983. By order dated April 8, 1983, Justice White extended the time for filing a petition for a writ of certiorari to and including May 19, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The pertinent parts of Sections 6501 and 6653 of the Internal Revenue Code of 1954 (26 U.S.C.) are set forth in App. F, *infra*, 35a-36a.

STATEMENT

For each of the years 1963 through 1966, respondents filed a false and fraudulent joint federal income tax return. After the Commissioner of Internal Revenue began an investigation of their tax liability, respondents filed nonfraudulent amended returns for 1965 and 1966 on September 13, 1968, and nonfraudulent amended returns for 1963 and 1964 on November 25, 1968. In 1970, respondents were convicted of willfully attempting to evade or defeat federal income taxes for the years 1963 through 1966 in violation of Section 7201 of the 1954 Code. *United States* v. *Alfonzo L. Dowell and Vivian T. Dowell*, Crim. No. 70-85 (W.D. Okla. May 17, 1970), aff'd, 446 F.2d 145, 146-147 (10th Cir.), cert. denied, 404 U.S. 984 (1971) (App. A, *infra*, 3a).

On December 11, 1974, the Commissioner issued a notice of deficiency to respondents, determining deficiencies in tax and additions to tax under Section 6653(b) for each of the years in question. In these proceedings brought in the Tax Court, respondents stipulated that their criminal convictions estopped them from denying that they had filed false and fraudulent original income tax returns for 1963 through 1966. They contended, however, that assessment of the deficiencies and penalties was nevertheless barred by the statute of limitations prescribed in Section 6501(a) of the 1954 Code because the deficiency notice was not issued within three years after the filing of the amended returns. The Tax Court rejected that contention, ruling that the exception provided by Section 6501(c)(1), allowing taxes to be assessed "at any time" where a fraudulent return is filed, continued to apply, despite respondents' subse-

quent filing of amended nonfraudulent returns (App. A, *infra*, 4a-5a).

The court of appeals reversed (App. B, *infra*, 6a-11a). In so ruling, the court upheld respondents' contention that the filing of nonfraudulent amended returns started the running of the ordinary three-year limitations period under Section 6501(a). The court remanded the case to the Tax Court for further proceedings in accordance with its opinion (App. B, *infra*, 11a).

On remand, respondents claimed that they were also entitled to recover $8,310.32 of the amount they had remitted in 1968 with their amended returns. That amount had been placed in a suspense account by the Commissioner and was not formally assessed until 1977.[1] The Tax Court ruled that "payment" occurred in 1968 when respondents remitted the funds with their amended returns and that it therefore lacked jurisdiction under Section 6512(b)(2) to determine the existence of refundable overpayments with respect to payments made in 1968 (App. C, *infra*, 12a-20a). On respondents' second appeal, the court of appeals affirmed (App. D, *infra*, 21a-32a). It agreed that the $8,310.32 remittance was a "payment" in 1968 and held that the respondents were barred from recovering any overpayments because they failed to file a claim for refund within three years from the time the payment was made (App. D, *infra*, 30a-32a).

REASONS FOR GRANTING THE PETITION

The question presented to the court of appeals on the first appeal in this case—whether the filing of nonfraudulent amended returns following the filing of fraudulent original returns starts the running of the three-year statute of limitations under Section 6501(a)

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[1] An additional $2,111.33 remitted with the amended returns was applied, in the first instance, against assessed liabilities for 1965 (App. D, *infra*, 22a).

of the Internal Revenue Code of 1954—will be resolved by the Court next term in *Badaracco* v. *Commissioner* and *Deleet Merchandising Corp.* v. *United States*, 693 F.2d 298 (3d Cir. 1982), cert. granted, Nos. 82-1453 and 82-1509 (May 16, 1983).

As we pointed out in our brief responding to the petitions for writs of certiorari in *Badaracco* and *Deleet Merchandising*, there is a square conflict of decisions on this issue between the Third and Fifth Circuits, on the one hand, and the Second and Tenth Circuits, on the other. The Third Circuit in *Badaracco* and *Deleet Merchandising* and the Fifth Circuit in *Nesmith* v. *Commissioner*, 699 F.2d 712 (1983), have upheld the Commissioner's interpretation of Section 6501(a) that was rejected by the court of appeals below and thereafter by the Second Circuit in *Britton* v. *United States*, 697 F.2d 288 (1982), aff'g mem., 532 F. Supp. 275 (D. Vt. 1981).[2]

For the reasons more fully set forth in our brief in response to the certiorari petitions in *Badaracco* and *Deleet Merchandising*, we submit that where false or fraudulent returns are filed in the first instance, the filing of nonfraudulent amended returns does not commence the running of the three-year limitations period under Section 6501(a). Rather, in such circumstances, the exception for the case of a false or fraudulent return continues to apply, providing an unlimited assessment period under Section 6501(c)(1) so that taxes can be assessed "at any time." Moreover, we believe the Court should resolve the conflict and establish a uniform national rule with respect to the interpretation of the statute of limitations provisions. Accordingly, the Court

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[2] In *Klemp* v. *Commissioner*, 77 T.C. 201 (1981), appeal pending, No. 81-7744 (9th Cir.), the Tax Court reversed its position on this issue and followed the court of appeals' decision in this case.

should hold this case until its disposition of *Badaracco* and *Deleet Merchandising*.[3]

CONCLUSION

The Court should hold the petition and dispose of this case in accordance with its dispositions in *Badaracco* and *Deleet Merchandising*, Nos. 82-1453 and 82-1509.[4]

Respectfully submitted.

REX E. LEE
Solicitor General

MAY 1983

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[3] Because there was no conflict at the time of the court of appeals' original decision remanding the case for further proceedings, the Commissioner did not then seek certiorari. Nor did he file a notice of appeal with respect to that portion of the Tax Court's decision on remand determining, in accordance with the Tenth Circuit's mandate, that there were no deficiencies for the years in question. Such a course would have been futile in light of the court of appeals' decision on the statute of limitations question.

Under this Court's decisions, these circumstances do not limit this Court's power to review the court of appeals' original holding at this time. The Court can now "consider all of the substantial federal questions determined in the earlier stages of the litigation * * *." *Reece* v. *Georgia*, 350 U.S. 85, 87 (1955). See also *Mercer* v. *Theriot*, 377 U.S. 152, 153-154 (1964); *Urie* v. *Thompson*, 337 U.S. 163, 172-173 (1949); *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 257-258 (1916); *Panama R.R.* v. *Napier Shipping Co.*, 166 U.S. 280, 284 (1897).

[4] We are serving a copy of this petition upon counsel for the petitioners in *Badaracco* and *Deleet Merchandising*. We are also furnishing a copy of our brief acquiescing to the grant of the petitions in *Badaracco* and *Deleet Merchandising* to counsel for the respondents in the instant case.

APPENDIX A

ALFONZO L. DOWELL AND VIVIAN T. DOWELL, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 2150-75 Filed August 1, 1977.

OPINION

TIETJENS, *Judge:* Respondent determined the following deficiencies in the petitioners' Federal income taxes:

		Additions to tax	
		Sec 6653(b)	*Sec 6653(a)*
Year	*Deficiencies*	*I.R.C. 1954*	*I.R.C. 1954*
1963	$4,794.86	$2,397.43	
1964	4,716.78	2,358.39	
1965	2,494.07	2,302.70	($ 4.00)
1966	5,479.16	2,739.58	(16.96)

The issue is whether the statute of limitations bars the assesment and collection of deficiencies in income taxes and additions to the taxes for the years 1963 through 1966.

The parties filed a full stipulation of facts which together with the exhibits attached thereto are incorporated by this reference.

Alfonzo L. and Vivian T. Dowell (petitioners), husband and wife, resided in Oklahoma City, Okla., when they filed their petition.

Petitioners filed joint U.S. income tax returns for the taxable years 1963, 1964, 1965, and 1966 with the District Director of Internal Revenue at Oklahoma City, Okla. These returns were filed on the following dates:

1963 return	June 16, 1964	1955 return	May 2, 1966
1964 return	June 15, 1965	1966 return	May 9, 1967

On November 25, 1968, petitioners filed purported amended Forms 1040 for the taxable years 1963 and 1964 with the Internal Revenue Service Center at Austin, Tex. Petitioners neither signed nor verified these returns.

On September 13, 1968, petitioners filed amended Forms 1040 for the taxable years 1965 and 1966 with the Internal Revenue Service Center at Austin, Tex. The four amended returns reported additional taxable income.

On September 30, 1972, petitioners executed a power of attorney (Form 2848) appointing Richard S. Karam and Fred E. Percival as attorneys in fact to represent petitioners before the Internal Revenue Service with respect to income taxes and employment taxes for the years 1963 through 1968. By such power of attorney, petitioners authorized Richard S. Karam and Fred E. Percival, or either of them, to execute consents extending the statutory period for assessment or collection of taxes.

On November 16, 1972, Fred E. Percival executed a Form 872 extending the period for assessment of income tax due from petitioners for the taxable year 1966 to October 31, 1973. The District Director signed this consent on November 17, 1972. The validity of the consent, by its terms, is conditioned upon the applicability of section 6501(e), I.R.C. 1954.[1]

On May 11, 1973, Fred E. Percival executed a Form 872 further extending the period for the assessment of income taxes due from petitioners for the taxable year 1966 to May 31, 1974. The District Director signed this consent on May 16, 1973.

On February 27, 1974, Fred E. Percival executed a Form 872 further extending the period for the assessment of income taxes due from petitioners for the taxable year 1966 to December 31, 1974. The District Director signed this consent on February 27, 1974.

The District Director sent petitioners a statutory notice of deficiency on December 11, 1974.

With respect to the taxable year 1966, petitioners omitted from their original income tax return gross income of $18,574.47, which amount is in excess of 25 percent of the gross income stated on that return, but less than 25 percent of the gross income reported in the amended income tax return for that year.

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[1] All statutory references are to the Internal Revenue Code of 1954, unless otherwise stated.

Petitioners were the defendants in the criminal case of *United States* v. *Alfonzo L. Dowell and Vivian T. Dowell*, Cr. No. 70-85 (W.D. Okla.), aff'd. 446 F.2d 145 (10th Cir. 1971), cert. denied 404 U.S. 984 (1971). The indictment in that case, which was filed on May 7, 1970, charged both petitioners with knowingly and willfully attempting to evade and defeat income taxes by filing false and fraudulent joint U.S. income tax returns for the years 1963, 1964, 1965, and 1966.

The petitioners, on May 17, 1970, entered a plea of not guilty to the charges.

On August 6, 1970, after trial on the merits, the jury rendered its verdict finding both petitioners guilty of violating the provisions of section 7201, as charged in the indictment, for each of the taxable years 1963, 1964, 1965, and 1966.

The United States offered all of the original and amended Forms 1040 involved in this case into evidence and the court received them without objection in the criminal case.

By reason of the criminal conviction, the petitioners are estopped in this case, under the doctrine of collateral estoppel (estoppel by judgment) from denying that they filed false and fraudulent original income tax returns for the taxable years 1963, 1964, 1965, and 1966, with the intent to evade and defeat a part of the income taxes due and owing by them for those years and that, due to such fraud, there is, for each year, an underpayment of tax within the meaning of section 6653(b).

Petitioners do not contest respondent's determination of taxable income and income tax liabilities, together with additions to the taxes, for the taxable yers 1963, 1964, 1965, and 1966, as set forth in the statutory notice of deficiency.

Petitioners' first contention is that their filing of amended income tax returns "tolled" the running of the statute of limitations.

Respondent contends that petitioners' filing of false and fraudulent original returns determines the applicable statute of limitations and that the subsequent filing of amended returns is of no import in determining whether the statutory notice was timely.

We agree with respondent.

Section 6501(a) provides the general rule that the Commissioner must begin proceedings for the assessment and collection of tax within 3 years after the return is filed.

Section 6501(c)(1) provides an exception in the case of a false or fraudulent return filed with the intent to evade tax. In such a case, the Commissioner may assess the tax, or begin a proceeding in court for the collection of such tax without assessment, at any time after the taxpayer files the false or fraudulent return.

Section 6501(e) provides another exception in the case of substantial omission of items. If a taxpayer omits from gross income an amount in excess of 25 percent of the gross income stated in the return, the Commissioner may assess the tax, or begin a proceeding in court for the collection of such tax without assessment, at any time within 6 years after the return was filed.

Petitioners argue that a 3-year statute of limitations began running with the filing of the amended income tax returns. Since the Commissioner mailed the statutory notice of deficiency more than 3 years after the filing of the amended returns, petitioners assert that the statutory notice was untimely.

It is well settled that when a taxpayer files an original return and thereafter an amended return, the statute of limitations begins to run from the date of the original return, and not the date of the filing of the amended return. *Kaltreider Construction, Inc.* v. *United States*, 303 F.2d 366 (3d Cir. 1962), cert. denied 371 U.S. 877 (1962); *Northern Anthracite Coal Co.* v. *Commissioner*, 21 B.T.A. 1116 (1931); 10 Mertens, Law of Federal Income Taxation, sec. 57.15, p. 33 (1976 rev.).

We have rejected an argument similar to that made by petitioners. In *Goldring* v. *Commissioner*, 20 T.C. 79 (1953), the taxpayer filed original returns which omitted more than 25 percent of gross income. Fifteen months later he filed amended returns which purported to correct, in part, the original omission, so as to reduce it below 25 percent. We held that the 5-year limitation as provided by section 275(c), I.R.C. 1939, started to run upon the filing of

the original return, and was not tolled by taxpayer's filing of the amended return. See also *Houston* v. *Commissioner*, 38 T.C. 486 (1962). Applying this rationale to the present situation, it follows that the filing of an amended return cannot operate to prevent the unlimited statute of limitations provided by section 6501(c)(1) from applying to the original return.

This analysis is consistent with the statutory method for the computation of the fraud penalty. Under section 6653(c)(1), taxes shown due on an amended return filed after the due date of an original return are to be disregarded in determining the underpayment to which the fraud penalty attaches. Rather, the fraud penalty prescribed by section 6653(b) is to be applied to the difference between the correct tax due and the tax shown on a timely filed return. *Stewart* v. *Commissioner*, 66 T.C. 54 (1976), and cases cited therein.

Petitioners rely on *Bennett* v. *Commissioner*, 30 T.C. 114 (1958), for the proposition that the amended Forms 1040 in this case started the 3-year statute of limitations running. *Bennett* involved a situation in which there was fraud in failing to file income tax returns. After the due date for filing the returns, the taxpayer filed nonfraudulent delinquent returns. The Court held that the 3-year statute of limitations applied to the delinquent returns. Thus, in *Bennett*, the Court applied the 3-year statute to an original, although delinquent, return. This is different from petitioners' situation.

As for petitioners' remaining contentions, two deal with the amended returns, one with the 1972 waiver, and one with the fraud penalty. Petitioners' argument about the fraud penalty is directly contrary to the stipulation of facts and deserves no more mention. Nor do we find it necessary to discuss the remaining contentions since we have determined that the statute of limitations is established by the nature of the original returns.

Decision will be entered under Rule 155.

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 78-1341

ALFONZO L. DOWELL AND VIVIAN T. DOWELL,
APPELLANTS,

v.

COMMISSIONER OF INTERNAL REVENUE, APPELLEE.

Filed: Feb. 11, 1980

ON APPEAL FROM THE DECISION OF THE UNITED STATES TAX COURT

Before SETH, Chief Judge, HOLLOWAY, Circuit Judge, and BROWN, District Judge*.

SETH, Chief Judge.

This is an appeal from a ruling of the United States Tax Court againt appellants. *Dowell* v. *Commissioner*, 68 T.C. 646. The facts are undisputed. Taxpayers filed fraudulent income tax returns for calendar years 1963, 1964, 1965, and 1966. On September 13, 1968, taxpayers filed nonfraudulent amended returns for 1965 and 1966, and on November 25, 1968 they filed nonfraudulent amended returns for 1963 and 1964.

The Government used the amended returns in its fraud investigation, and also used them to convict taxpayers of

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*Honorable Wesley E. Brown, of the District of Kansas, sitting by designation.

willfully filing fraudulent returns for 1963-1966. *United States* v. *Dowell*, 446 F.2d 145 (10th Cir.).

The Government apparently also used the amended returns to determine additional taxes due for all four years plus penalties and interest. Taxpayers received a notice of deficiency issued December 11, 1974, and filed a petition in the Tax Court which sought a refund and a bar against further assessments.

The taxpayers' position is that the nonfraudulent amended returns satisfied the requirements of 26 U.S.C. § 6501(a), and accordingly started the three-year period of limitation. Thus they assert that the Government failed to assess within the three-year period. The Tax Court held in substance that there was no limitation period for assessment of the 1963-1966 taxes because the original returns were fraudulent, and the matter was governed only by § 6501(c)(1) which entitled the Government to assess tax "at any time." Thus it held that the taxpayers could not start the period provided in § 6501(a). For the reasons that follow we must disagree with the ruling of the Tax Court.

The general statute of limitations, 26 U.S.C. § 6501(a), provides "any tax imposed by this title shall be assessed within 3 years after the return was filed." However, it is often difficult to determine whether certain filings are "returns." The Supreme Court in *Zellerbach Paper Co.* v. *Helvering*, 293 U.S. 172, held:

> "Perfect accuracy or completeness is not necessary to rescue a return from nullity, if it purports to be a return, is sworn to as such ..., and evinces an honest and genuine endeavor to satisfy the law. This is so though at the time of filing the omissions or inaccuracies are such as to make amendment necessary."

Thus once the taxpayer has evinced an honest and genuine effort to satisfy the law by filing such a return, the § 6501(a) period begins to run.

In *John D. Alkire Inv. Co.* v. *Nicholas*, 114 F.2d 607 (10th Cir.), this court held that a subsequent corrective filing to a *deficient return* started the three-year limitations period. Taxpayer had filed returns from 1926 to 1935 that "not only failed to disclose requisite information but were

misleading and calculated to prevent discovery of material facts." In late 1936, taxpayer filed amended returns for each year in question. These contained the required information, and we held they started the limitations period. There was no holding of fraud in *Alkire* but the original returns were totally deficient and misleading.

In *Bennett* v. *Commissioner*, 30 T.C. 114, *acq.* 1958-2 C.B. 3, taxpayer originally failed to file any return. The Tax Court found as fact the "failure to file was deliberate and fraudulent with intent to evade tax." Taxpayer eventually filed a return which satisfied the requirements of the three-year statute of limitations. The Tax Court held the subsequent filing of an honest return triggered the three-year limitations period notwithstanding the previous applicability of § 6501(c)(3). The court reasoned:

> "For, once a nonfraudulent return is filed, putting the Commissioner on notice of a taxpayer's receipts and deductions, there can be no policy in favor of permitting assessment thereafter at any time without limitation. We think that the statute of limitations begins to run with the filing of such returns."

This reasoning is equally compelling in this case. Furthermore, the Internal Revenue Service adopted the *Bennett* holding in Rev. Rul. 79-178, 1979-23 I.R.B. 16. The Tax Court did not here follow its *Bennett* opinion because it reasoned the *Bennett* court applied the three-year limitation to "an original, although delinquent return," and therefore "[t]his is different from petitioners' situation." The distinction thus was made between a fraudulent failure to file and a fraudulent return.

The question would seem to be whether taxpayers have filed a return that meets the requirements of § 6501(a) and *Zellerbach*, not whether the return was "original" or "amended." The fraudulent returns filed in the first instance here were really not "returns" within the meaning of § 6501(a) or *Zellerbach*. They started no statute of limitations; they simply entitled the Government to make its assessment "at any time" as provided in § 6501(c)(1). This "at any time" does not mean regardless of what may take place. It is not, as the Government argues, some sort of pe-

riod of limitation or "statute of limitations." We are thus not concerned with an act which stops the running of a period of limitations. We are concerned instead with something which *starts* the period. Section 6501(c) represents the antithesis of a limitations concept, and in the absence of anything else the commencement of any period of repose for fraudulent or evasive "returns" is put in limbo.

The purpose of § 6501(c) is to provide the Government time to unearth information the taxpayer did not furnish and to file an assessment. Once the Government has the information from a *Zellerbach* filing or as in *Alkire* or as said in *Bennett*, "there can be no policy in favor of permitting assessment thereafter at any time without limitation." Thus the Government's reliance on cases such as *Kaltreider Construction, Inc.* v. *United States*, 303 F.2d 366 (3d Cir.), and *Houston* v. *Commissioner*, 38 T.C. 486, is misplaced.

The original returns in the case before us are in many respects comparable to those in *John D. Alkire Inv. Co.* v. *Nicholas*, 114 F.2d 607 (10th Cir.). In the cited case there was found to be no fraud, but we said, as mentioned above:

> "The returns not only failed to disclose requisite information but were misleading and calculated to prevent discovery of material facts. Returns of that kind are not effective to start the period of limitation running."

The amended returns were held to be sufficient to start the period of limitations. We consider that the *Alkire* decision is not necessarily controlling, but is sufficiently similar to indicate the conclusion to be reached in this appeal.

The position of the Government also fails to recognize that §§ 6501(c)(1) and 6501(c)(3) are in *pari materia* and accordingly should be construed consistently with one another. The Revenue Act of 1921 extended the unlimited assessment period to include failure-to-file situations, and also included this in the same subsection with fraudulent filings. *See* 10 *J. Mertens, The Law of Federal Income Taxation* §§ 57.09 and 57.10 (1976). These two situations were so included in the same subsection through the Internal Revenue Code of 1939, § 276(a). *See Colony, Inc.* v. *Commissioner*, 357 U.S. 28, 29 n.1. The 1954 Code retained them in the same subsection, but for some undisclosed rea-

son placed the two situations into separate subdivisions, §§ 6501(c)(1) and 6501(c)(3). Congress provided no indication that it intended statute of limitations treatment to differ between taxpayers who filed fraudulent returns, and those who fraudulently failed to file.

The Government raises the additional argument that the statute governing failure to file a return, § 6501(c)(3), would be rendered superfluous by taxpayers' reading of § 6501(c)(1) (fraudulent filing). This argument is not persuasive, and it has carried little weight through the decades of litigation on this point. It is a better reading of § 6501 to conclude that Congress foresaw the need for express exceptions to the general statute of limitations in at least two situations—fraudulent filing and failure to file. The fraud penalties and criminal prosecution take care of the fraud problem. The "at any time" assessment is not a further penalty. Once the taxpayer has filed a *Zellerbach-Alkire* return the "at any time" reason is removed, and the matter proceeds as in any tax case. No irrevocable forfeiture of the benefits of limitation periods is contemplated as an additional punishment or penalty. That the "case" may be in one division of the IRS or in another division can make no difference.

The Government raises two subsidiary issues. It argues taxpayers' amended returns for the 1963 and 1964 were unsigned, and it contends that taxpayers consented to an extension of the limitations period for 1966. We find no evidence that an unconditional consent to the extension of the limitation period was made. As to the unsigned returns, it is well-settled that as a general proposition an unsigned return does not start the statute of limitations period. *Kalb* v. *United States*, 505 F.2d 506 (2d Cir.); *Doll* v. *C.I.R.*, 358 F.2d 713 (3d Cir.) (per curiam). This rule is not without exception. In the case before us the Government "accepted" the unsigned returns. It did not return them for signature as was the practice or otherwise indicate any doubt that they were the returns of the taxpayers. This case is unusual as to this acceptance aspect as to the unsigned returns, and also as to the other amended returns. As has been indicated above, the Government used the amended

returns in its investigation of the taxpayers, and it also relied on and used the returns in the prosecution of the fraud case against taxpayers. We have no indication in this record that in so doing the filing of, the identity of, or the validity of the returns was questioned by the Government. The use in the fraud case is alone sufficient to constitute "acceptance" for all purposes.

We find no merit to the contention that as to the *original* 1966 return the 25% provision applied to extend the limitation period. Section 6501(e) was not applicable thereto.

The judgment of the Tax Court is REVERSED and the case is REMANDED.

APPENDIX C

T.C. Memo. 1980-515

UNITED STATES TAX COURT

ALFONZO L. DOWELL AND VIVIAN T. DOWELL, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 2150-75. Filed November 20, 1980.

MEMORANDUM OPINION

TIETJENS, *Judge:* This case is on remand from the Court of Appeals for the Tenth Circuit. The circuit court, 614 F.2d 1263 (1980), reversing our decision in 68 T.C. 646 (1977), held that the filing of a nonfraudulent amended return starts the running of the statute of limitations under section 6501(a)[1] and that respondent's notice of deficiency for the years 1963 through 1966, mailed over six years after the filing of petitioners' amended nonfraudulent returns, was therefore untimely. Petitioners filed a motion for this Court to enter a decision that no deficiency exists for 1965 and that petitioners are entitled to refunds for the following overpayments:

Year	*Overpayment*
1963	$2,579.18
1964	3,703.76
1966	2,027.38

Respondent objected to petitioners' Motion for Entry of Decision and filed a motion urging us to enter a decision that there are no deficiencies due from nor overpayments due to petitioners for the taxable years 1963 through 1966. The sole issue for our determination at this time is whether

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[1] All statutory references are to the Internal Revenue Code of 1954, as amended and in effect for the years in issue, unless otherwise stated.

petitioners are entitled to overpayments for 1963, 1964, and 1966.

The facts of this case are fully stipulated. Most of the facts relevant to this issue appear in our earlier decision but for the sake of clarity and continuity, we will repeat them briefly as well as newly enunciate those facts in the stipulated record that are only pertinent here.

Petitioners filed fraudulent original returns for 1963 through 1966 which showed the following tax liabilities:

Year	*Liability*
1963	$160.13
1964	59.63
1965	80.04
1966	339.23

On September 13, 1968 for the years 1965 and 1966 and on November 25, 1968 for the years 1963 and 1964, petitioners filed amended nonfraudulent returns which showed the following additional tax liabilities:

Year	Additional Liability
1963	$2,579.18
1964	3,703.76
1965	2,111.33
1966	2,027.38

Attached to petitioners' amended returns were remittances for these amounts and each amended return is marked "Received with Remittance" by the Internal Revenue Service.

A statement identical in all material respects to the following was attached to each of petitioners' amended returns:

> Payment attached to this amended 1963 return, is hereby made under protest. We feel that the amount of deposits in question represents funds received for political purposes and gifts. These funds were used for political purposes.
>
> We hope and feel that eventually we will be able to get a more precise record of these funds.

On December 11, 1974, respondent mailed petitioners a notice of deficiency. In the statement schedule, only the additional amount of $2,111.33 submitted with petitioners' 1965 amended return is shown as having been credited to petitioners' account. The remaining $8,310.32 which was

submitted with petitioners' amended returns for 1963, 1964, and 1966 was not so applied; rather, these remittances were held by respondent in a suspense account.

In petitioners' petition filed with this Court on March 11, 1975, petitioners include among facts upon which they rely as the basis for their case the assertion that:

> 5C. The amended delinquent returns for the four years were submitted with cash remittances of $8,310.32. The remittances submitted with the returns were not credited to other tax deficiencies which the Internal Revenue Service has since taken collection action on and it has been necessary for the taxpayers to make payment in full of these other liabilities, the Commissioner having applied, prior to any notice of deficiency, the cash remittances accompanying the amended delinquent returns as being tax paid that applies to the tax liability indicated on said amended delinquent returns, all in accord with the income tax self-assessment system.

In their reply submitted to this Court on June 2, 1975, petitioners maintained:

> 5. AS TO RETURNS FILED UNDER PROTEST:
>
> A. The allegation in paragraph 5.B. of the Respondent's Answer alleges that the amended returns for the years 1963, 1964, 1965, and 1966 were filed under protest is not true. These returns were not filed under protest. Payment of the tax was made under protest in that the tax advisor obviously had a concern over prior tax law that required payment to be made under protest as a requisite to a later refund claim.

Finally, in the stipulation of facts, the parties stipulated that:

> 25. Petitioners do not contest respondent's determination of taxable income and income tax liabilities, together with additions to the taxes, for their taxable years 1963, 1964, 1965, and 1966, as set forth in the statutory notice of deficiency.

Petitioners maintain that the remittances are overpayments which this Court has jurisdiction to refund to them. Their argument is rooted in their interpretation of *Rosenman* v. *United States*, 323 U.S. 658 (1945) that there

is no payment upon a remittance to a suspense account. Petitioners assert that since respondent placed $8,310.32 in a suspense account and did not assess petitioners' 1963, 1964, and 1966 amended returns until September 26, 1977, payment was not made until that time.

Respondent, by contrast, contends that the remittances attached to petitioners' amended returns were payments in 1968 because petitioners intended to satisfy defined tax liabilities. If the remittances are held to be payments, respondent proceeds with his argument, since they are not in excess of petitioners' tax liabilities, were not erroneously or illegally collected, and did not cause the Government to be enriched unjustly, respondent can retain the remittances. Finally, respondent argues that the amounts shown on the face of the amended returns are not to be reduced by reason of the statements of protest attached to the returns.

We hold for the respondent.

Section 6512(b)(1) confers jurisdiction on this Court to determine an overpayment which is refundable to the taxpayer when the Tax Court decision becomes final.[2] Section 6512(b)(2) limits this amount to only that portion paid either after the deficiency notice was mailed, or within the period of limitations for filing a refund claim under section 6511(b)(2), (c), (d), or (g) which could have been refundable if on the date the notice of deficiency was mailed a claim had been filed, or under certain specified conditions where a timely refund claim was actually filed. In the instant case, therefore, since no refund claim was ever filed, we may only determine the existence of an overpayment refundable to petitioners if we find that the remittances were payments after December 11, 1972.[3]

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[2] To determine when a Tax Court decision has become final, see section 7481. The Tax Court will only consider the issue of whether or not there has been an overpayment where the question was appropriately raised in the taxpayer's petition. See *Finen* v. *Commissioner*, 41 T.C. 557 (1964). In the instant case, petitioners' petition asserted two statute of limitations issues as the only issues in this case; however, their petition included a claim for a refund of $8,310.32.

[3] Only payments made after December 11, 1972 would satisfy the requirements of section 6512(b)(2)(B); to satisfy requirements of section

The record shows that petitioners' 1963, 1964, and 1966 returns were "assessed" on September 26, 1977.[4] We have repeatedly held, however, that an assessment is not a prerequisite to a payment.[5] *Fortugno* v. *Commissioner*, 41 T.C. 316 (1963), affd. 353 F.2d 429 (3d Cir. 1965); *Draper* v. *Commissioner*, 32 T.C. 545 (1959); *Arheit* v. *Commissioner*, 31 T.C. 46 (1958).

Where there has been no assessment, the test we have applied to determine when payment has been made is one drawn from *Rosenman* v. *United States*, supra. See, e.g. *Fortugno* v. *Commissioner*, *supra*; *Lewyt Corp.* v. *Commissioner*, 18 T.C. 1245 (1952), affd. 215 F.2d 518 (2d Cir. 1954).

The Supreme Court, in *Rosenman*, held that a taxpayer's remittance which is coupled with a clear statement that the money was intended solely to avoid the accumulation of

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6512(b)(2)(A), the payment would have had to have occurred after December 11, 1974, the date on which the notice of deficiency was mailed.

[4] The term assesment is used here as it appears in section 6213(b)(4) since under section 6213(a) no other assessment could occur before this Court's decision is made final. Both parties agree that petitioners 1965 return was assessed in 1968 upon receipt.

[5] Other courts have held that an assessment is required before a remittance may constitute a payment. See, e.g. *United States* v. *Dubuque Packing Co.*, 233 F.2d 453 (8th Cir. 1956); *Thomas* v. *Mercantile Nat. Bank of Dallas*, 204 F.2d 943 (5th Cir. 1953). While originally so holding, see *Budd Co.* v. *United States*, 252 F.2d 456 (3d Cir. 1957); *Compania Ron Carioca Destileria, Inc.* v. *United States*, 144 Ct. Cl. 66, 168 F.Supp. 546 (1958), the Court of Appeals for the Third Circuit as well as the Court of Claims now hold that an assessment is not a necessary precondition for a payment. See *Richardson* v. *Smith*, 196 F.Supp. 432 (E.D. Pa. 1961), affd. per curiam 301 F.2d 305 (3d Cir. 1962); *Hill* v. *United States*, 263 F.2d 885 (3d Cir. 1959); *Rose* v. *United States*, 256 F.2d 223 (3d Cir. 1958); *Northern Natural Gas Co.* v. *United States*, 173 Ct. Cl. 881, 354 F.2d 310 (1965); *Charles Leich & Co.* v. *United States*, 165 Ct. Cl. 127, 329 F.2d 649 (1964); *Moskowitz* v. *United States*, 152 Ct. Cl. 412, 285 F.2d 451 (1961). Similarly, the Second, Sixth, Seventh, and Tenth Circuits do not necessarily require an assessment before payment may occur. See, e.g. Ameel v. *United States*, 426 F.2d 1270 (6th Cir. 1970); *United States* v. *Miller*, 315 F.2d 354 (10th Cir. 1963); *Colt's Manufacturing Co.* v. *Commissioner*, 306 F.2d 929 (2d Cir. 1962); *Plankinton* v. *United States*, 267 F.2d 278 (7th Cir. 1959).

interest and penalties and which the Government placed in a suspense account does not constitute a payment.[6] Petitioners would have us read *Rosenman* as creating a rule that we look only to respondent's actions to determine the time a remittance becomes a payment. Petitioners argue that a taxpayer's "intentions in making a remittance are not controlling; at most they may bear upon what the Commissioner does with such remittance." Respondent, however, urges us to accept the converse: that petitioners' intent is the critical factor in determining when a payment is made and that respondents' acts are of lesser significance.

In *Rosenman*, there was a correspondence between the taxpayer's express intent to make a deposit and not a payment and the Commissioner's placing the remittance in a suspense account. Here, where there is no clear direction by the taxpayer that the remittance was made solely to avoid interest and penalties and where both petitioners' and respondent's actions have been inconsistent,[7] the parties wish us to decide the pivotal element of the two factors present in *Rosenman*.

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[6] Applying this rule in *Fortugno* v. *Commissioner*, 41 T.C. 316 (1963), affd. 353 F.2d 429 (3d Cir. 1965), we stated, similarly:

> no overpayment exists with respect to a particular fund until all or a part of that fund has been assessed or until the taxpayer acquiesces in the proposed deficiency or a part thereof and the deposited fund is allocated to the payment of the agreed deficiencies. [citations omitted] 41 T.C. at 322.

[7] Respondent, on receiving petitioners' amended 1965 return, assessed those amounts upon receipt and credited the amount to discharge petitioners' tax liability for that year. Under similar conditions, he placed the remittances accompanying petitioners' amended 1963, 1964, and 1966 returns in a suspense account. We can find no rationale for this disparate treatment although both parties seem to accept it. Petitioners have not claimed that respondent erroneously classified their amended 1965 return remittance as a payment in 1968. Respondent, on the other hand, attributes his placing the remittances for petitioners' amended 1963, 1964, and 1966 returns in a suspense account to his misinterpretation of the law regarding when the statute of limitations for petitioners' amended returns began to run; yet, that explanation is curious in light of his contradictory actions with regard to petitioners' amended 1965 return.

We hold that it is a taxpayer's intentions which control the determination of whether a remittance is a deposit or a payment.[8] Although our decisions on this issue have sometimes referred to respondent's actions, we have always given his actions secondary emphasis and have used them as a means to interpret a taxpayer's intent. See, e.g., *Fortugno* v. *Commissioner, supra.*

Indeed, the Court of Appeals for the Tenth Circuit, to which an appeal in this case would lie, has indicated its position is consonant with the test we are applying herein.[9] In *United States* v. *Miller,* 315 F.2d 354, 356 (10th Cir. 1963), a case involving payment of estimated taxes, the court stated:

> The manner in which the two checks were handled in the Director's office is not dispositive of the case. We express no opinion as to the validity or propriety of the procedures followed. As we appraise the situation, the unilateral actions of the Director made without the knowledge or acquiescence of the taxpayers do not determine whether the checks were voluntary remittances or were in discharge of an obligation imposed by the federal income tax statutes.

Examining petitioners' intentions in 1968 when they filed amended returns for 1963, 1964, and 1966, we find that petitioners intended to discharge a defined tax liability and, therefore, that their remittances were payments in that year.

Essentially, when a taxpayer files a return together with a remittance, the taxpayer is assumed to be making a payment at that time.[10] Courts have found two principal excep-

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[8] To hold otherwise would result in allowing the Commissioner to ignore a taxpayer's clear intention to make a payment and thereby discharge his or her tax liability or alternatively to make a deposit solely to avoid the accumulation of interest and penalties.

[9] Likewise, the Courts of Appeal for the Third and Fifth Circuits have emphasized the importance of examining a taxpayer's intent rather than looking at the Commissioner's actions. See *Binder* v. *United States,* 590 F.2d 68 (3d Cir. 1978); *Hill* v. *United States, supra; Thomas* v. *Mercantile Nat. Bank at Dallas, supra.*

[10] *See United States* v. *Consolidated Edison Co. of N.Y.,* 366 U.S. 380 (1961); *Essex* v. *Vinal,* 499 F.2d 226 (8th Cir. 1974); *Ameel* v.

tions to this assumption:[11] (1) where a remittance is accompanied by a contest of liability for the tax, such as an express statement that the remittance is being made solely for the purpose of avoiding interest and penalties,[12] or a remittance is concomitant with a claim for a refund[13] or an offer of compromise;[14] and (2) where the remittance is "disorderly" or "a dumping" in that there is no indication on the return of how the taxpayer arrived at his or her asserted tax liability.[15]

In the instant case, petitioners' remittances accompanied their respective amended returns. They were not "disorderly" but clearly reflected the items of income and deductions asserted on these returns. Likewise, we find that petitioners did not contest their liabilities for 1963, 1964, and 1966. Firstly, petitioners' amended returns for the years in issue were not joined with claims for a refund.[16] Secondly,

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United States, supra; Northern Natural Gas Co. v. *United States, supra; Hill* v. *United States, supra.* See also *Shubert* v. *Commissioner*, 41 T.C. 243 (1963), where we found that because a payment did not accompany a return, the taxpayer's intent to make a payment was unknown and, accordingly, the Commissioner was correct in placing the money in a suspense account.

[11] For an elaboration of this point, see *Northern Natural Gas Co.* v. *United States, supra* at 314-316.

[12] See *Rosenman* v. *United States*, 323 U.S. 658 (1945); *United States* v. *Consolidated Edison Co. of N.Y., supra; Rose* v. *United States, supra; Estate of Colfelt* v. *Commissioner*, 35 T.C. 769 (1961); *Arheit* v. *Commissioner*, 31 T.C. 46 (1958).

[13] See, e.g. *United States* v. *Consolidated Edison Co. of N.Y., supra; Charles Leich & Co.* v. *United States, supra; Holmes* v. *Commissioner*, 47 T.C. 622 (1967).

[14] See, e.g. *Moskowitz* v. *United States, supra; Keith* v. *Commissioner*, 35 T.C. 1130 (1961).

[15] See, e.g. *Budd Co.* v. *United States, supra.*

[16] A protest is not synonymous with a claim for a refund. *Hollie* v. *Commisioner*, 73 T.C. 1198 (1980); *Hansen* v. *Commissioner*, 9 T.C. 108 (1947). To determine whether a protest qualifies as a refund claim, the test to be applied is whether the protest statement advised the Commissioner in writing that a refund was being sought. *Hollie* v. *Commissioner, supra* at 1212-1213. In the instant case, the statements attached to petitioners 1963, 1964, and 1966 returns do not satisfy this requirement.

these returns were not accompanied by offers of compromise. Finally, no statement was attached to petitioners' amended return which would indicate that the remittances were being made solely to avoid interest and penalty charges.

The statement attached to each amended return at issue[17] indicated that a portion of petitioners' income represented funds received for political contributions or gifts and that they hoped eventually to substantiate this assertion. Yet, there is no further evidence that this protest was seriously pursued. No claim for a refund was ever filed. In the pleadings and in the stipulation of this case, moreover, there appears to be a disavowal or at least an abandonment of any contest. Petitioners' reply states these statements were never intended to be a protest but were intended to allow petitioners the option of filing refund claims should they later so desire. In addition, in paragraph 25 of the stipulation, petitioners agreed to respondent's calculation of their correct tax liabilities for all of the years 1963 through 1966.

On the particular facts of the case, we hold that the remittances accompanying petitioners' amended returns for 1963, 1964, and 1966 were payments prior to December 12, 1972. Consequently, we have no jurisdiction to determine the existence of any overpayments. Respondent's motion and petitioners' motion insofar as pertains to a finding of no deficiency for the taxable years 1963, 1964, 1965, and 1966 are, therefore, granted. In all other respects, as pertains to any overpayments, both petitioners' and respondent's motions are moot.

An appropriate order will be entered.

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[17] Petitioners' 1965 amended return contained virtually identical, if not the same, statement as the ones attached to the three amended returns at issue here. Yet, petitioners accede the remittance with this return was a payment in 1968.

APPENDIX D

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 81-1237

ALFONZO L. DOWELL AND VIVIAN T. DOWELL,
APPELLANTS,

v.

COMMISSIONER OF INTERNAL REVENUE, APPELLEE.

APPEAL FROM THE UNITED STATES TAX COURT
(Docket No. 2150-75)

Filed Jan. 19, 1983

Before BARRETT, McKAY and LOGAN, Circuit Judges.

BARRETT, Circuit Judge.

Alfonzo and Vivian Dowell (Dowells) appeal from a decision of the Tax Court, on remand from this court, that they are not entitled to refunds for overpayment of taxes. The Dowells have appeared before this court in appeals related to the same disputed taxes on two prior occasions. *See Dowell* v. *Commissioner*, 614 F.2d 1263 (10 Cir. 1980) (hereinafter referred to as *Dowell II*) *and United States* v. *Dowell*, 446 F.2d 145 (10th Cir.), *cert. denied*, 404 U.S. 984 (1971) (hereinafter referred to as *Dowell I*). Consequently, all relevant facts are stipulated.

In the years 1963 through 1966 the Dowells filed fraudulent original tax returns showing the following tax liabilities:

Year	*Liability*
1963	$160.13
1964	59.63
1965	80.04
1966	339.23

After the Commissioner of Internal Revenue (Commissioner) began an investigation of those returns, the Dowells filed amended nonfraudulent returns which showed the following additional tax liabilities:

Year	*Additional Liability*
1963	$2,579.18
1964	3,703.76
1965	2,111.33
1966	2,027.38

Attached to each of the amended returns were remittances in the stated amounts and statements essentially identical to the following:

> Payment attached to this amended 1963 return, is hereby made under protest. We feel that the amount of deposits in question represents funds received for political purposes and gifts. These funds were used for political purposes.
>
> We hope and feel that eventually we will be able to get a more precise record of these funds.

In 1970, the Dowells were convicted by a jury of knowingly and willfully attempting to evade or defeat federal income taxes by filing false and fraudulent returns for the years 1963 through 1966. This conviction was affirmed in *Dowell I*, *supra*. In 1974, the Commissioner mailed to the Dowells a notice of deficiency which informed the Dowells that additional liabilities had been asessed against them for the years in question. The statement schedule revealed that only the additional amount of $2,111.33, submitted with the amended 1965 return, had been credited to the Dowells' account. The remaining $8,310.32, submitted with the amended returns for 1963, 1964, and 1966, was shown

to be held in a suspense account, and substantial deficiencies beyond that amount were claimed to be due.

The Dowells filed a petition with the Tax Court contesting the determination of deficiency, claiming that the Commissioner was barred by the statute of limitations from assessing the taxes for 1963 through 1966.[1] In the stipulation of facts the parties agreed that the Dowells were not contesting the Commissioner's determination of taxable income and income tax liabilities as set forth in the deficiency notice; they contended only that the Commissioner was barred from assessing those amounts. The Tax Court ruled that the fraudulent returns did not trigger the statute of limitations; therefore, the assessments were timely. This court reversed and remanded the case to the Tax Court, holding that the amended 1963 returns were sufficiently honest and informational to start the running of the period of limitations in I.R.C. § 6501(a) (West 1967). Thus, the deficiency notice, mailed over six years after the filing of the 1968 returns, was untimely. *Dowell II, supra* at 1265.

On remand, the Dowells filed with the Tax Court a motion requesting it to enter a decision that no deficiency existed for 1965, and that they were entitled to refunds for overpayments in the amount of $8,310.32, representing the total of the 1968 remittances for the years 1963, 1964, and 1966. The Commissioner objected and filed a motion urging the Tax Court to enter a decision that there were neither deficiencies nor overpayments due for the years in question.

The Tax Court considered I.R.C. § 6512 (West 1967), relating to refund of overpayments when a taxpayer has challenged a deficiency notice in the Tax Court, to be the controlling statute. Under I.R.C. § 6512(b)(1) (West Supp. 1981), the Tax Court has jurisdiction to determine overpayments only if I.R.C. § 6512(b)(2) (West Supp. 1981), is satisfied. That section provides that the amount that can be refunded is limited to taxes paid: (1) after the mailing of the

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[1] I.R.C. § 6501(a) (West 1967), provides that "the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed."

deficiency notice; or, (2) within the applicable limitations period for filing a refund claim under I.R.C. § 6511(b)(2), (c), (d), or (g), if a refund claim had been filed on the date of the deficiency notice (whether or not actually filed); or, (3) under certain conditions where a timely refund claim actually was filed. I.R.C. § 6512(b)(2)(A), (B), and (C) (West Supp. 1981). No refund claim had been filed. Accordingly, the Tax Court had to determine whether "payment" occurred either after the mailing of the deficiency notice, or within the two years preceding the deficiency notice.[2] The Tax Court found that payment occurred in 1968, well outside the applicable period. Thus, the court ruled that under I.R.C. § 6512(b)(1) (West Supp. 1981), it had no jurisdiction to determine the existence of overpayments, and simply granted both parties' motions with respect to finding no deficiencies for 1963 through 1966.

On appeal, the Dowells contend that the Tax Court erred in finding that the 1968 remittances constituted "payments" because the Commissioner held them in suspense accounts and did not assess them until 1977, and the remittances were intended by the Dowells to be "deposits", not "payments". According to the Dowells, payment did not occur until 1977, within the relevant periods of limitation, when the Commissioner finally assessed the 1968 remittances.[3] The primary issue before us, therefore, is when payment was consummated here. Before reaching that issue, however, we must determine whether we have jurisdiction over this appeal.

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[2] Since § 6512(b)(2)(B) treats the date of the deficiency notice as the date of the filing of the claim, the applicable section, I.R.C. § 6511(b)(2)(B) (West 1967), requires that the amount of the refund "shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim."

[3] We note again that only the years 1963, 1964, and 1966 are in dispute here. Despite the protest language on the 1968 remittance for the 1965 tax, the Dowells concede that because the Commisioner did immediately assess that remittance, and credited it to the Dowells' account rather than placing it in a suspense account, "payment" of the 1965 tax did occur in 1968.

I.

The Commisioner contends that under I.R.C. § 7481(3)(B)(iii) (West 1967), the Dowells had thirty days from the date of the Tax Court's decision on remand to file an appeal, and inasmuch as they failed to do so, the Tax Court decision became final and the right of appeal was foreclosed. The Dowells argue that because the decision on remand involved a legal issue not decided by, or even presented to, this court in *Dowell II*, and because additional briefs were submitted by both parties, the case on remand involved more than mere computations or other ministerial acts. Instead, Dowells argue, the case on remand involved something akin to a rehearing. When a United States Court of Appeals remands a case to the Tax Court for rehearing, I.R.C. § 7481(4) (West 1967), provides that the decision of the Tax Court upon rehearing will become final as provided in I.R.C. § 7483 (West Supp. 1981), which allows a taxpayer ninety days within which to file an appeal before the decision of the Tax Court becomes final. The Dowells contend that since they filed this appeal within ninety days of the Tax Court's decision, though more than thirty days beyond it, the appeal was timely and this court does possess jurisdiction over it.

We agree with the Dowells that this case involves a hybrid situation. Most of the decisions that strictly enforce the thirty day limitation concern remands where the Tax Court needed to do no more than recompute the deficiencies or liabilities in accordance with the appellate decision. *See, e.g., Crews* v. *Commisioner*, 120 F.2d 749 (10th Cir.), *cert. denied*, 314 U.S. 664 (1941); *Toledano* v. *Commissioner*, 403 F.2d 218 (5th Cir. 1968); *Heard* v. *Commissioner*, 285 F.2d 352 (3rd Cir. 1960). In *McGah* v. *Commissioner*, 210 F.2d 769, 770 (9th Cir. 1954), in contrast, though the court did not order a rehearing, it held that its remand with instructions to the Tax Court to "make further findings and enter such decision as it deemed proper" was essentially a directive for a rehearing, invoking the longer limitation period. While the Tax Court here clearly was required to do more than merely recompute taxes, we

can not justify such an expansive interpretation of the mandate in *Dowell II:* "The judgment of the Tax Court is REVERSED and the case is REMANDED." *Dowell II, supra* at 1267.

It is our view, nevertheless, that the actions on remand did amount to the equivalent of a rehearing. This court in *Dowell II* did not address or determine the issue of "payments versus deposits". The determination that the Commissioner was barred from assessing and collecting deficiencies did not necessarily require the Commissioner to refund as overpayments the amounts already remitted. The motions of both the parties did far more than propose recomputations; they raised a legal issue not previously addressed, but essential to the resolution of the case. Under these circumstances, we hold that the three month limitation on appeals is appropriate. Thus, this appeal was timely filed, and we have jurisdiction.

II.

The substantive issue here is whether the 1968 remittances were "deposits" rather than "payments". Relying on the Supreme Court's decision in *Rosenman* v. *United States*, 323 U.S. 658 (1945), the Dowells argue that because the remittances for 1963, 1964, and 1966 were placed in suspense accounts, they were treated as deposits by the Commissioner, and could not become payments until they were assessed. Even if payment can precede assessment, the Dowells maintain further that their clear intent to tender the money only as a deposit, expressed in the protest language, coupled with the Commissioner's treatment of the remittances, requires a determination that the remittances were only deposits.

Some courts have interpreted *Rosenman* as requiring an assessment before a remittance can constitute a payment. *See, e.g., United States* v. *Dubuque Packing Co.*, 233 F.2d 453 (8th Cir. 1956); *Thomas* v. *Mercantile National Bank at Dallas*, 204 F.2d 943 (5th Cir. 1953); *but see Republic Petroleum Corporation* v. *United States*, 618 F.2d 518, 526 n.20 (5th Cir. 1980) *and Ford* v. *United States*, 613 F.2d 357, 359-61 (5th Cir. 1980). In our view, however, this cir-

cuit is aligned with the majority of courts in refusing to apply a *per se* rule. *See United States* v. *Miller*, 315 F.2d 354 (10th Cir.), *cert. denied*, 375 U.S. 824 (1963); *Accord: Ameel* v. *United States*, 426 F.2d 1270 (6th Cir.1970); *Colt's Manufacturing Co.* v. *Commissioner*, 306 F.2d 929 (2d Cir.1962); *Plankinton* v. *United States*, 267 F.2d 278 (7th Cir. 1959); *Hill* v. *United States*, 263 F.2d 885 (3rd Cir. 1959); *Northern Natural Gas Co.* v. *United States*, 173 Ct. Cl. 881, 354 F.2d 310 (1965). Under our taxing system, taxpayers are required to file returns and pay the tax shown to be due on the return without any notice or assessment by the Commissioner. I.R.C. § 6151(a) (West 1980). In most situations, the taxpayer, though aware of the remittance, will be unaware of the actual act of assessment. *See Ameel, supra* at 1274. Indeed, in this case the deficiency notice was apparently the first indication to the Dowells that their remittances had been placed in suspense accounts. Therefore, we adhere to our reasoning in *Miller* that "the unilateral actions of the Director made without the knowledge or acquiescence of the taxpayers do not determine" whether a remittance is a payment or a deposit, *Miller, supra* at 356, and hold that payment can occur prior to assessment.

This court must consider a variety of factors, including the use of suspense accounts and the lack of assessment, in determining whether a remittance is a payment or a deposit. The controlling factors, however, are the circumstances of the remittance and the intent of the taxpayer. *See Miller, supra* at 358-59; *Northern Natural Gas Company, supra* at 315; *Fortugno* v. *Commissioner*, 353 F.2d 429, 435 (3rd Cir. 1965), *cert. dismissed*, 385 U.S. 954 (1966). Ultimately, the resolution of a question of "deposit versus payment" depends on the facts of a particular case. For that reason, we are not persuaded by the numerous cases cited to us by Dowells finding remittances to be deposits. We think that a direct comparison between this case and *Rosenman* and *Miller*, will properly determine the issue here.

In *Rosenman*, the taxpayers received an extension of time to file a return, but not to pay the taxes due. Thus,

the taxpayers were forced to deliver a check for estimated taxes two months before they finally determined their liability and filed a return. Under those circumtances, the taxpayers attached to the remittance this disclaimer:

> We are delivering to you herewith ... an Estate check payable to your order ... as a payment on account of the Federal Estate tax.... This payment is made under protest and duress, and solely for the purpose of avoiding penalties and interest, since it is contended by the executors that not all of this sum is legally or lawfully due.

Rosenman, supra at 659-60. The funds were placed in a suspense account. More than three years after the estimated tax was paid, the Commissioner assessed a deficiency and applied the funds in the expense account to satisfy it. The taxpayers later filed a refund claim which the Commissioner rejected as untimely since "payment" had occurred more than three years earlier.

The Supreme Court ruled that payment sufficient to start the running of the statute of limitations did not occur until the funds were removed from the suspense account and the deficiency assessed. Until that time, there was no basis for the taxpayers to assert a refund claim. *Id.* at 661. The Court did not treat the original remittance as a payment because "the taxpayer did not discharge what he deemed a liability nor pay one that was asserted. There was merely an interim arrangement to cover whatever contingencies the future might define." *Id.* at 662. It is clear that the taxpayers in *Rosenman* in good faith were attempting to comply with the law, while preserving their legal rights. The Commissioner was on notice of the taxpayers' intentions and treated the remittances accordingly. To treat the remittances as payments, capable of triggering the statute of limitations, and barring the taxpayers' rights to claim a refund, while allowing the Commissioner to conceal his position until after the statute had run, would have been manifestly unjust.

In contrast, the taxpayers in this case were not in the position of paying estimated taxes in order to avoid violating the law; they had already violated it. Whatever their rea-

sons were for the 1968 remittances—the record is silent on this point—the Dowells can hardly be heard to argue that they were forced to make payments prior to the time their liabilities were defined in order to comply with the law. At best, they were trying to mitigate a fraud they had already committed. Nor were the remittances mere estimates. It is true that the Dowells may not have known the full extent of their liability, but they did state certain liabilities in the amended returns and tendered remittances in those exact amounts. Finally, the Dowells can not seriously contend that their protests were sufficient to notify the Commissioner that their remittances were filed as an interim measure only. The time for filing their returns and tendering payments had long since passed, the Commissioner had not required them to file the amended returns, and the assertion that the Dowells were paying under protest, and that they "hope[d] and fe[lt] that eventually" they could find more precise records did not warn the Commissioner that the remittances should be kept only as deposits. The Dowells, unlike the taxpayers in *Rosenman*, were not only discharging what they deemed to be a liability, they were doing so long after the liability had accured.

The actions of the Commissioner in placing the remittances in the suspense account do not alter the above conclusion. It seems apparent that the funds were placed in the suspense accounts because of the ongoing fraud investigation, not because the Dowells' protests called into question their ultimate liability. In any event, though the actions of the Commissioner may be a factor, *Miller*, *supra* at 356, informs us that they are not dispositive. There, the taxpayers mistakenly paid estimated taxes. This court held that since the taxpayers had an obligation to declare and pay estimated taxes, the fact that they erroneously believed the obligation to be greater than it actually was did not vitiate their intent to discharge the obligation by paying the tax. The remittances were held to be payments sufficient to start the running of the statute of limitations. *Id.* at 358-59. The obligation here was to report and pay the taxes in 1963 through 1966. The Dowells failed to do so, but apparently sought to discharge the obligation through the

amended returns. The Dowells' position is entitled to far less sympathy than that of the taxpayers in *Miller*. We hold that the 1968 remittances were payments sufficient to commence the running of the statute of limitations at the time they were tendered.

III.

Since the taxes were paid in 1968, the Tax Court's analysis with respect to the limitations on refund in I.R.C. § 6512(b) is correct. It is our view, however, that in light of § 6511(a), such an analysis is unnecessary. That section provides that a

> [c]laim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later. . . .

I.R.C. § 6511(a) (West 1967). Section 6512, *supra*, provides a limited extension of this period when a deficiency notice is mailed by the Commissioner and challenged by the taxpayer in the Tax Court. In this case, however, the § 6511(a) period had already run when the actions invoking § 6512 occurred. Under these circumstances, we believe any claim for refund for overpayment was already precluded by § 6511(a).

If the Dowells legitimately believed that their records would disclose that the disputed income was in fact campaign contributions, the three years from the time they filed the amended returns in 1968 provided a sufficient amount of time for them to so prove. The very purpose of periods of limitations, such as that in § 6511(a), is "to cut off rights, justifiable or not, that might otherwise be asserted." *Kavanagh* v. *Noble*, 332 U.S. 535, 539 (1947). In fact, Dowells never asserted such a claim. Furthermore, in the stipulation of facts they admitted that they did not contest the liabilities assessed for 1963 through 1966. Thus, the only basis for the Dowells' assertion of overpayment is that the Commissioner was barred from assessing the taxes for the years in question.

Technically, under I.R.C. § 6401(a) (West Supp. 1981), the 1968 remittances are overpayments.[4] In our view, however, that section contemplates the normal situation where some taxes are paid, a deficiency is assessed, and then the deficiency is paid. In those situations, § 6401(a) and our decision in *Dowell II* insure that a taxpayer can seek a refund of time-barred deficiency payments. We believe, nevertheless, that neither § 6401(a), nor *Dowell II*, requires the Commissioner to refund payments lawfully due when paid, but fortuitously rendered "overpayments" by the inaction of the Commissioner.

There may be situations where payments prior to assessment should be refunded; if the claim is meritorious, however, there most likely will be factors supporting a finding that the payments were deposits under the *Rosenman* rule, preventing a harsh application of the limitations period. In general, we conclude that it is best to adhere to the rule that "all income tax refund claims, *whatever the reasons giving rise to the claims*, must be filed within three years from the time the return was filed or within two years from the time the tax was paid...." *Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 534-35 (1947) (emphasis added).

That rule is particularly applicable in this case. The Dowells filed fraudulent returns, then later filed amended returns with payments attached. Notwithstanding, the Dowells were convicted of willfully filing fraudulent returns. Through the failure of Commissioner to assess the amended returns in a timely fashion, the Dowells were relieved of the duty to pay additional deficiencies. *Dowell II*, *supra*. The Dowells would have us extend *Dowell II* and § 6401(a) to allow them to recover the 1968 payments, thereby conferring upon them the full benefit of their fraudulent acts. We cannot believe that those authorities require such an absurd result.

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[4] I.R.C. § 6401(a) states:

(a) Assessment and collection after limitation period.—The term "overpayment" includes that part of the amount of the payment of any internal revenue tax which is asessed or collected after the expiration of the period of limitation properly applicable thereto.

Under § 6511(a), the Dowells had three years from the time the returns were filed to file any legitimate claim for refund of overpayments. No claim was filed in that time, and the untimely deficiency notice did not revive their right to seek refund of those payments. Pursuant to § 6511(a), the Dowells were barred from seeking refund of the 1968 payments as overpayments. The Tax Court had no jurisdiction to hear such a claim.

The decision of the Tax Court is AFFIRMED.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 78-1341

ALFONZO L. DOWELL AND VIVIAN T. DOWELL,
PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

JANUARY TERM—February 11, 1980

JUDGMENT

Before Honorable Oliver Seth, Chief Judge, Honorable William J. Holloway, Jr., Circuit Judge, and Honorable Wesley E. Brown, District Judge*

This cause came on to be heard on the record on appeal from the United States Tax Court, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is reversed. The cause is remanded to the United States Tax Court for further proceedings in accordance with the opinion of this Court.

By HOWARD K. PHILLIPS
HOWARD K. PHILLIPS
Clerk

*Of the District of Kansas, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

November Term—January 19, 1983

No. 81-1237

ALPHONZO L. DOWELL AND VIVIAN T. DOWELL,
PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

JUDGMENT

Before Honorable James E. Barrett, Honorable Monroe G. McKay, and Honorable James K. Logan, Circuit Judges

This cause came on to be heard on the record on appeal from the United States Tax Court and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

By HOWARD K. PHILLIPS
HOWARD K. PHILLIPS
Clerk

APPENDIX F

Internal Revenue Code of 1954 (26 U.S.C.):

SECTION 6501. LIMITATIONS ON ASSESSMENT AND COLLECTION.

(a) [as amended by Section 165(a), Excise Tax Technical Changes Act of 1958, Pub. L. No. 85-859, 72 Stat. 1275] *General Rule*—Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

* * * * *

(c) *Exceptions*—

(1) *False return*—In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

(2) *Willful attempt to evade tax*—In case of a willful attempt in any manner to defeat or evade tax imposed by this title (other than tax imposed by subtitle A or B), the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(3) *No return*—In the case of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

* * * * *

(e) [as amended by Section 810(b)(2), Excise Tax Reduction Act of 1965, Pub. L. No. 89-44, 79 Stat. 136] *Substantial omission of items.*—Except as otherwise provided in subsection (c)—

(1) *Income taxes*—In the case of any tax imposed by subtitle A—

(A) *General rule*—If the taxpayer omits from the gross income an amount properly in-

cludible therein which is in excess of 25 percent of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed. For purposes of this subparagraph—

(i) In the case of a trade or business, the term "gross income" means the total of the amounts received or accrued from the sale of goods or services (if such amounts are required to be shown on the return) prior to diminution by the cost of such sales or services; and

(ii) In determining the amount omitted from gross income, there shall not be taken into account any amount which is omitted from gross income stated in the return if such amount is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Secretary [or his delegate] of the nature and amount of such item.

* * * * *

SECTION 6653. FAILURE TO PAY TAX.

* * * * *

(b) [as amended by Section 2, Act of Jan. 12, 1971, Pub. L. No. 91-679, 84 Stat. 2063] *Fraud*—If any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. In the case of income taxes and gift taxes, this amount shall be in lieu of any amount determined under subsection (a). In the case of a joint return under section 6013, this subsection shall not apply with respect to the tax of a spouse unless some part of the underpayment is due to the fraud of such spouse.

* * * * *